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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
JUSTIN WHIPPLE,
Defendant.

Case No. 12-cr-00119-SI-1

ORDER DENYING DEFENDANT JUSTIN WHIPPLE'S MOTION FOR COMPASSIONATE RELEASE

Re: Dkt. No. 1738

Defendant Justin Whipple has filed a motion for compassionate release that is noticed for a hearing on June 19, 2020. The Court determines that the matter is suitable for resolution without oral argument. For the reasons set forth below, the Court DENIES defendant's motion.

DISCUSSION

Defendant Justin Whipple pled guilty to one count of RICO conspiracy pursuant to 18 U.S.C. § 1962(d), four counts of attempted murder in aid of racketeering pursuant to 18 U.S.C. § 1959(a), and two counts of use/possession of a firearm in furtherance of a crime of violence pursuant to 18 U.S.C. §§ 924(j)(1), and (c)(1)(A). Mr. Whipple is currently serving a 168-month sentence at FCI Oakdale in Oakdale, Louisiana, and his projected release date is April 7, 2024. Mr. Whipple is 28 years old.

Defendant has filed a motion seeking compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). As amended by the First Step Act, that statute provides:

[T]he court, upon motion of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment . . . after considering the

1 factors set forth in section 3553(a) to the extent that they are applicable, if it finds
2 that –

3 (i) extraordinary and compelling reasons warrant such a reduction

4 . . .

5 and that such a reduction is consistent with applicable policy statements issued by
6 the Sentencing Commission.

7 *Id.*

8 Defendant asserts that he has shown “extraordinary and compelling” reasons for
9 compassionate release because he tested positive for COVID-19 on May 13, 2020, and he has an
10 underlying medical condition – moderate to severe asthma – that makes him particularly vulnerable
11 to developing complications from the virus. In support of the motion, defense counsel has filed a
12 declaration stating that in preparation for the filing of this motion, she has spoken to Mr. Whipple
13 once and exchanged written messages with him, and that based upon those exchanges she has
14 learned the following:

15 On March 21 or 22, 2020, Mr. Whipple and three cellmates began experiencing fever,
16 headaches, dizziness, no smell or taste. On March 24, 2020, they reported their
17 symptoms to medical staff. On March 25, 2020, he was screened by medical staff
18 and removed from his housing unit to quarantine, with many others presumed to be
19 sick.¹ On April 1, 2020, his cellmate Nicholas Rodriguez (#19868-111) died of
COVID-19. On April 10, 2020, he and 75-80 other inmates from quarantine were
moved to a “tent-city” in the recreation yard, sleeping in 20-man tents. On three
occasions over the following 18 days, storm warnings caused danger to sleeping in
tents, so the entire group of 75-80 men were ordered to sleep in a small Chapel,
literally shoulder to shoulder on the floor. On April 28, 2020, Mr. Whipple was
moved from the “tent-city” to a dorm style housing unit, where he remained until he
was put back into quarantine on May 20, 2020.

20 The intervening event, which led Mr. Whipple to be re-quarantined, was the COVID-
21 19 test. On May 13, 2020, almost two months after the initial outbreak, Mr. Whipple
22 was finally given a COVID-19 test. On May 20, 2020, he was moved back into
23 quarantine, but was only told that he might be positive. He waited [four] long days
until May 24, 2020, when he learned he tested positive. He mailed his test results to
me, and after redacting sensitive information the one-page document is attached to
this motion as Exhibit B.

24 Mr. Whipple has been informed that he will be in quarantine until mid-June 2020.
25 When he last spoke to counsel on May 27, 2020, Mr. Whipple reported that he was
26 not at that time experiencing current COVID-19 symptoms. However, he is very
concerned that the virus is continuing to spread through the facility, because he is

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28 ¹ According to defendant’s reply brief, at the March 25, 2020 medical screening, defendant
did not have a fever and he reported that he was not experiencing any symptoms at that time. Dkt.
No. 1743 at 3.

quarantined along with all of the other COVID-19 positive inmates. Although they are each in an individual cell, the air circulates from one cell to another freely.

2 Sheridan Decl. at 2 (Dkt. No. 1738-1). Defense counsel's declaration also states that she spoke to
3 defendant's mother, Kathy Mitchell, and that Ms. Mitchell reported that defendant was treated for
4 asthma as a child and that he used an inhaler, and that *inter alia* he was admitted to the emergency
5 room 8-10 times from age 7 to approximately 14. *Id.* at 1. Ms. Mitchell also reported to defense
6 counsel that defendant stopped using the inhalers as frequently in his later teens. *Id.*² According to
7 Ms. Sheridan's declaration, Mr. Whipple confirmed to defense counsel that he has not used an
8 inhaler for asthma symptoms while in BOP custody, though he also reports that when he gets sick
9 with a cold or flu, he has experienced trouble breathing and wheezing in his lungs. *Id.* at 2.
10 Defendant requests that the Court reduce his sentence to time served and to order his immediate
11 release into home confinement with his mother and her fiancé.

12 The government objects on numerous grounds. It argues that Mr. Whipple has not shown
13 “extraordinary and compelling” reasons because, although Mr. Whipple has tested positive for
14 COVID-19, his BOP medical records show that he has not developed complications and instead has
15 remained asymptomatic.³ The government also notes that defendant’s Presentence Investigation
16 Report stated he did not have any serious or chronic health issues, and that his BOP medical records
17 do not reflect any diagnosis or treatment for asthma. The government argues that notwithstanding
18 the COVID-19 diagnosis, given his young age (28) and generally good health, defendant has not
19 shown that he is at a particularly higher risk of severe illness or death as a result of the virus. The
20 government also argues that defendant is a danger to others given the seriousness of the underlying
21 convictions, including that defendant admitted his guilt and involvement in a triple murder and

23 ² Defendant's reply brief states that counsel obtained Mr. Whipple's medical records from
24 Kaiser showing his treatment for asthma as a child and prior to being incarcerated. Although the
 reply brief states that those records would be filed under seal, they have not.

1 attempted murder of four others, three of whom were actually shot.

2 The Court has carefully reviewed the parties' papers and concludes that compassionate
3 release is not warranted. The Court is very concerned about the spread of COVID-19 in the federal
4 prison system, and especially about the outbreak at FCI Oakdale. However, while defendant tested
5 positive on May 13 for the virus, the Court finds it significant that he has remained largely⁴
6 asymptomatic, that he appears to be in generally good health, and that he has not required treatment
7 for his asthma during the 8 years he has been in BOP custody. The Court finds that on this record
8 Mr. Whipple is not currently "suffering from a serious physical or medical condition . . . that
9 substantially diminishes the ability of the defendant to provide self-care within the environment of
10 a correctional facility and from which he . . . is not expected to recover." *See* U.S.S.G. § 1B1.13
11 cmt. N.1(A)(ii)(I).

12 Accordingly, the Court DENIES defendant's motion. The Court is not unsympathetic to
13 the concerns defendant has raised about the conditions at FCI Oakdale and his own personal health.
14 Defendant's motion is denied without prejudice to renewal in the event his health significantly
15 deteriorates.

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17 **IT IS SO ORDERED.**

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19 Dated: June 18, 2020



20 SUSAN ILLSTON
21 United States District Judge

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28 ⁴ Defendant asserts that he did complain of symptoms on March 21 or 22, but he concedes
that he has not reported experiencing any symptoms after that date.